BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONNA THOMPSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,037,533
HASTY AWARDS	)	
Respondent	)	
AND	)	
	)	
CONTINENTAL WESTERN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the January 22, 2009, preliminary hearing Order of Administrative Law Judge Kenneth J. Hursh (ALJ). Claimant was awarded medical benefits after the ALJ determined that claimant had suffered carpal tunnel syndrome (CTS) as a result of the repetitive use of her right hand at work.

Claimant appeared by her attorney, Mark E. Kolich of Lenexa, Kansas. Respondent and its insurance carrier appeared by their attorney, Nathan D. Burghart of Lawrence, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held January 21, 2009, with attachments; and the documents filed of record in this matter.

ISSUES

1. Did claimant's CTS develop as the result of either the accident of October 17, 2006, or as the result of a separate series of injuries while working for respondent?

2. Did the ALJ exceed his jurisdiction by awarding benefits against respondent and its insurance carrier after determining that the CTS did not arise out of the accident associated with the above designated claim, and after ordering claimant to file another claim for that series of accidents?

3. What is the proper date of accident for the series of accidents that allegedly resulted in claimant developing CTS? Did the ALJ err in finding the date of accident under K.S.A. 2006 Supp. 44-508(d) to be the date when claimant was provided restrictions for an injury not covered by the CTS claim?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed.

Claimant worked as a production worker for respondent when, on October 17, 2006, she suffered an injury to her right shoulder, neck and upper back when she lifted a tub of metals[1] and experienced a sudden pop in her right shoulder. Claimant reported the accident and the shoulder and neck complaints, but failed to mention any hand involvement. Claimant was referred for medical treatment and ultimately came under the care of orthopedic surgeon Gregory P. Lynch, M.D., on January 29, 2007. Dr. Lynch diagnosed right shoulder pain and possible cervical radiculopathy. During the examination, claimant did identify radiating symptoms into her right elbow and right hand with numbness and tingling in the fingers of her right hand. However, Dr. Lynch did not diagnose CTS. Claimant continued with treatment for her right shoulder and neck, but received nothing for the CTS. Additionally, claimant testified that she did not experience right hand problems until June of 2007.

In July 2007, claimant underwent EMG tests which indicated CTS. But, again claimant received no treatment for the CTS and was not told of the diagnosis at that time. Claimant was referred to Paul M. Arnold, M.D., for a surgical consult for the shoulder and neck, but did not discuss her hand complaints with him. She was also referred to Todd Winters, D.C., for 10 chiropractic treatments between January 17, 2008, and May 9, 2008. Claimant also did not discuss her hand complaints with Dr. Winters.

Claimant was referred by her attorney to orthopedic surgeon Edward J. Prostic, M.D., for an examination on September 17, 2008. At that time, claimant was diagnosed

[1] It is not clear whether it is "metals" or "medals". It appears both ways in the record.

with CTS and advised of the diagnosis. Claimant then filed an amended E-1 with the Division of Workers Compensation alleging the original injuries but adding the CTS claim, still with a date of injury of October 17, 2006. Dr. Prostic attributed claimant's CTS to repetitive use beginning October 17, 2006, and continuing, rather than the October 2006 traumatic lifting injury to claimant's shoulder.

Claimant testified that the CTS does not relate to the lifting incident, but rather to her long-term performance of a task identified as "linking metals". Claimant also testified that her right hand difficulties did not begin until June 2007 and the restrictions placed on her by Dr. Lynch in 2007 were for the shoulder injury and not the CTS.

The ALJ found that claimant had suffered injuries to her right upper extremity at the shoulder, but found that the CTS was not likely initiated by the October 17, 2006, incident. He stated that the CTS "probably arose from the claimant's repetitive use of her hand, and just happened to become symptomatic soon after the October 17, 2006 shoulder/neck injury".[2] The ALJ went on to find an accident date of January 29, 2007, the date Dr. Lynch gave claimant restrictions for her shoulder and neck. The ALJ held that the restrictions were to prevent claimant from performing the work that was causing claimant's CTS. However, claimant testified that the restrictions were for her shoulder and not the CTS. Claimant was not advised of the CTS nor restricted for that condition until she was examined by Dr. Prostic in September 2008. The ALJ then ordered respondent and its insurance company to provide an authorized physician for the right CTS, with Dr. Lynch ordered as the ongoing authorized treating physician for the neck and shoulder complaints. Claimant was advised in the Order to file a separate application for hearing for the series of accidents that caused the CTS.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

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[2] ALJ Order at 2.

[3] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

It is undisputed that claimant suffered an accidental injury on October 17, 2006, with injuries to her right shoulder and neck. The dispute centers around the CTS and its cause. Here, claimant testifies that the right hand problems did not begin until June 2007, but identifies numbness and tingling during her examination with Dr. Lynch in January 2007. However, claimant requested no medical treatment for the CTS for nearly two years. The diagnosis of CTS, made after the EMG studies in July 2007, was not made known to claimant. She also failed to discuss the hand complaints while receiving treatment from several doctors and while undergoing 10 chiropractic treatments for her neck and shoulder. Additionally, the ALJ found the CTS was not caused by the October 17, 2006, lifting injury, but probably occurred as the result of repetitive activities at work. Even after the negative finding that the CTS was not the result of the October 2006 accident, the ALJ ordered respondent to provide medical treatment for the CTS condition in this docketed claim.

This Board Member finds that the ALJ was correct that the CTS occurred from repetitive activities at work with respondent and not from the lifting incident in October 2006. The ALJ had the choice of conforming the pleadings to the evidence and treating this docketed claim as encompassing both the specific accident of October 17, 2006, and the series of accidents, or he could require claimant to file a new claim alleging injury by a series of accidents for the CTS condition. But the ALJ exceeded his jurisdiction in ordering medical treatment for a condition not caused by the claimed accident when, in the same Order, the ALJ also instructed claimant to file a new claim for that injury.

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[5] K.S.A. 2006 Supp. 44-501(a).

[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

K.S.A. 2008 Supp. 44-508(d) states:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

The finding that claimant's date of accident was on January 29, 2007, when restrictions were placed on her by Dr. Lynch, is reversed. The restrictions were for claimant's shoulder and had no effect on claimant's repetitive job activities, the very activities she testified were causing her hand problems. As no authorized physician took claimant off work or restricted claimant due to the CTS, the date of accident would have to be the date of written notice to the employer, which would be the date the E-1, Application For Hearing, was filed alleging CTS as a result of the October 2006 accident. This E-1 was filed on October 10, 2008, which would be the appropriate date of accident under K.S.A. 2008 Supp. 44-508(d).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

[7] K.S.A. 44-534a.

CONCLUSIONS

The Order of the ALJ is reversed as claimant did not suffer accidental injury to her right hand which developed into CTS from the October 17, 2006, accident. Instead, claimant suffered a series of accidents, with an accident date of October 10, 2008. Claimant was advised to file a separate action for the CTS, which, according to the briefs of the parties, she has done. Claimant's entitlement to medical treatment for the CTS should be properly litigated in that matter.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated January 22, 2009, should be, and is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of April, 2009.

HONORABLE GARY M. KORTE

c: Mark E. Kolich, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge